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RECENT DECISIONS ON TRADE-MARKS AND UNFAIR TRADE.—It is well settled law that a person has a right so to present his goods to the public that they will be recognized as his goods. In so presenting them he may use a distinctive sign or mark, but it must be of such a character as actually to make them distinct. *Canal Co. v. Clarke* (1871), 13 Wall. 311. He can not use a generic term, or one simply descriptive of the goods, for such a mark would not differentiate his goods from others of the same kind. *Koehler v. Sanders* (1890), 122 N. Y. 65; HOPKIN'S UNFAIR TRADE, pp. 58-73; HESSELTINE'S, THE LAW OF TRADE-MARKS AND UNFAIR TRADE (1906), p. 6 et seq; 1 MICHIGAN LAW REVIEW, 128.

Both federal and state statutes have been passed which provide for the registration of appropriate signs or marks; this registration gives the owner the right to use the particular mark as a technical trade-mark. The modern policy of the courts is, however, to restrict the field of technical trade-marks and to widen the scope of what is known as unfair trade. (See note to *Scheuer v. Miller*, 20 C. C. A. 166).

In the case of *The New York Herald Company v. Star Company* (1906), 146 Fed. Rep. 204, the Herald Company filed a bill alleging that they and their licensees had used the words "Buster Brown" as a heading for their comic sheet for several years, and praying for an injunction restraining the defendant from using the words in a like manner. JUDGE LACOMBE held that the Herald Company had title to the words and that an injunction pendente lite should issue. The complainant, as stated in the opinion, sought solely to restrain the infringement of a trade-mark, no question as to copyright or unfair competition being presented. There would seem to be no doubt that the complainant had the exclusive right to the use of the words "Buster Brown," as the term is neither generic nor descriptive.

On the same day the opinion in the counter-suit of *Outcalt v. New York Herald* (1906), 146 Fed. Rep. 205, was filed. In this case Mr. Outcalt filed a bill to enjoin the Herald Company from offering for sale "any other pictures in which, although the scenes and incidents are different, some of the characters are imitations of those which appeared in the earlier pictures which complainant sold to defendant." JUDGE LACOMBE in dismissing the bill said, "It is sufficient to say that no authority is cited supporting this proposition which seems entirely novel and does not commend itself as sound."

The weight of authority is clearly to the effect that in unfair competition in trade the essence of the wrong is the fraud upon the public which induces the public to take the defendant's goods for the complainant's. *Croft v. Day* (1843), 7 Beav. 84; *Amoskeag Mfg. Co. v. Spear* (1849), 4 N. Y. Super. Ct. (2 Sandford) 599; *Pierce v. Guittard* (1885), 68 Cal. 68; *Vitascope Co. v. U. S. Phonograph Co.* (1897), 83 Fed. Rep. 30; *Singer Mfg. Co. v. June Mfg. Co.* (1896), 163 U. S. 169. Contra, see *Clinton Metallic Paint Co. v. N. Y. Metallic Paint Co.* (1898), 50 N. Y. Supp. 437. See also *Dover Stamping Co. v. Fellows* (1895), 163 Mass. 191, 28 L. R. A. 448.

Under the facts of *Outcalt v. N. Y. Herald* it would seem that the public could be deceived by the imitations of Mr. Outcalt's drawings, for the like-

ness could be striking enough so that an ordinary reader would not detect the difference.

There is another point upon which some courts base the doctrine of Unfair Trade. These courts hold that where a business has been built up by one person, by the use of distinctive signs or marks, no other person has the right to imitate such signs or marks and thereby gain a part of the good will of the business of the first user. *Wolfe v. Burke* (1874), 56 N. Y. 115; *Church v. Kresner* (1898), 49 N. Y. Supp. 742; *Enterprise Mfg. Co. v. Landers* (1904), 131 Fed. Rep. 240. It would seem that under these decisions Mr. Outcalt would have a common law right in the figures he has originated, for he has spent much time and labor in perfecting the type represented, and it is only because of his success that the Herald Company now insist upon printing imitations. To be sure they bought the pictures but did they buy the right to imitate that type?

In July, 1906, the case of *Warren Bros. v. Barber Asphalt Paving Company*, 108 N. W. Rep. 652, was decided by the Supreme Court of Michigan. In that case the complainant filed a bill alleging that it had coined the term "Bitulithic" pavement in 1902, and had copyrighted it in the office of the Secretary of State of Michigan, and that it had spent much time and money in advertising it, and also that it was a great success. It further alleged that in 1904 the City of Detroit, by its Department of Public Works, called for proposals for the construction of "Bitulithic" pavement, and the call further stated that the streets and avenues specified, were to be paved according to the specifications adopted by the common council, Feb. 23, 1904; also according to the estimates of the city engineer and the charter and ordinances of the City of Detroit. The defendant submitted bids which were accepted and complainant filed this bill to enjoin the defendant from using the word "Bitulithic" and from offering to manufacture the "Bitulithic" pavement.

The court, speaking through Mr. JUSTICE MOORE, does not directly decide the point as to whether or not the complainant has exclusive right to use the term "Bitulithic" alone, but decides that, since the municipality in its call for bids, described in detail the pavement required, any one has the right to construct such a pavement.

"We think," says the court, "there is nothing in what is proposed to be done by defendant, calculated to deceive the municipalities inviting bids, into the belief that the defendant was proposing to furnish to them a pavement made only by the complainant."

While the Michigan court recognizes the rule as to fraud upon the public, it restricts the scope of the fraud to the cities of Detroit and Cadillac. It has been held that the persons deceived do not need to be specific. *Von Mumm v. Frash* (1893), 56 Fed. Rep. 830. Yet, perhaps on account of the nature of pavement, great care would naturally be used in its selection, and the chances of deceit would be small. It would seem, however, that the complainants ought to have been given the exclusive right to use the word "Bitulithic," otherwise the copyright is useless.

F. B. D.